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No. 03-241

IN THE

Supreme Court of the United States

QWEST CORPORATION,

Petitioner,

v.

METRONET SERVICES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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As explained in our petition, the Court should hold this case pending its disposition of *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, *cert. granted*, No. 02-682 (Mar. 10, 2003). This Court's general practice is to hold a petition for certiorari whenever the challenged decision could be drawn into question by the Court's subsequent disposition of a pending case raising similar issues. Respondent MetroNet makes no serious effort to explain why the Court should deviate from that sound practice here. It does not deny that, if this Court adopts the positions of the United States or Verizon in *Trinko*, the Ninth Circuit would almost certainly be required to reverse the decision below and reinstate the district court's judgment for Qwest.

Instead, MetroNet argues only that the Court "could" avoid the central merits issue in *Trinko* and resolve the case

on threshold standing grounds independent of the merits (which, in practical terms, would be akin to a decision to dismiss the writ in that case as improvidently granted). Opp. 11.[1] But *whenever* the Court holds a petition pending disposition of a previously filed case, there is always some possibility that no remand will be necessary because the Court's disposition of the previously filed case will be consistent with the court of appeals' decision in the subsequently filed case. The Court nonetheless holds such cases so long as there is also a reasonable possibility that the Court's disposition of the previously filed case will show that court of appeals' decision in the subsequently filed case may have been wrong. That is indisputably the circumstance presented here.

On the merits, MetroNet argues that the Ninth Circuit's antitrust analysis is "beyond dispute and attack." Opp. 11. That is incorrect. Indeed, as discussed in our petition, the position of the federal government's own antitrust authorities in *Trinko* is squarely at odds with the Ninth Circuit's liberal views of liability under the "essential facilities" and "exclusionary conduct" standards in the duty-to-deal context. MetroNet does not contend otherwise.

Finally, MetroNet claims that Qwest adopted a per-location pricing policy "in order to eliminate competitors" rather than "to increase short term profits by targeting its discount." Opp. 13. This too is wrong. It is undisputed (i) that Qwest wished to offer discounts only to those customers that would otherwise purchase private switching equipment in lieu of continued Centrex service; (ii) that customers with fewer than 20 lines in any given location were much less likely than those with more lines to incur the fixed costs of that equipment and cancel Centrex service; and (iii) that

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[1] Because the standing issues in *Trinko* are statutory rather than constitutional, the Court would be free to reach the merits in that case even if it agreed with Verizon that the plaintiffs lack standing. *See Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83 (1998).

Qwest could enforce that discount limitation only by adopting a policy of per-location pricing. As discussed in our petition, antitrust law permits a firm in these circumstances to engage in such "differential pricing," in part because a contrary rule would tend to deter firms from offering any discounts to anyone. Pet. 18-19 & nn.17-18. The legal result is the same even if enforcing a differential pricing policy means disadvantaging the would-be arbitrageurs, like MetroNet, that seek to profit from undermining that policy. *Id.* MetroNet offers no discernible response to any of these points.

CONCLUSION

For the reason given above and in our petition, the petition for writ of certiorari should be held pending disposition of *Trinko* and disposed of as appropriate in light of the resolution of that case. If the Court fails to reach the merits in *Trinko*, the petition should be granted.

Respectfully submitted,

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